In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-970

EARL KUHNS and RICHARD CASTNER,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

Petitioners seek review of a judgment entered by the California Court of Appeal, First Appellate District, Division One, entered in the above-entitled case on September 8, 1974, and reported at 61 Cal.App.3d 735, 132 Cal.Rptr. 725.

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to Title 28, United States Code section 1257(3).

STATEMENT OF THE CASE

On February 4 and 14, 1971, amended complaints were filed in the Municipal Court of the Santa Cruz County Judicial District, County of Santa Cruz, State of California, charging each petitioner with three counts of violation of California Penal Code section 311.2 (distribution and exhibition of obscene matter, a misdemeanor). Petitioners entered pleas of not guilty to the charges.

The charges resulted in two separate jury trials. The first trial, which took place in May, 1971, concerned the magazine "Response, the Photo Magazine of Sex for Women". As a result of the convictions in this trial, petitioner Kuhns received a sentence of 90 days in the county jail, one day suspended, and was fined $1,250.00 Petitioner Castner was sentenced to 40 days in the county jail and was fined $625.00. The second trial took place in September and October, 1971, and involved two books entitled "Animal Lovers" and "Sex and the Teenager". As a result of these convictions, petitioner Kuhns was sentenced to 180 days in the county jail, one day suspended, sentences to run concurrently, and fined $2,500.00 ($1,250.00 on each count). Petitioner Castner was sentenced to 90 days in the county jail, sentences to run concurrently, and fined $1,250.00 ($625.00 on each count). Petitioners filed notices of appeal and were admitted to bail pending appeal.

On November 9, 1972, the Appellate Department of the Santa Cruz County Superior Court affirmed the judgments of conviction. Petitioners remained on

bail, however, while they filed a petition for certiorari before this Court. Following the decision in *Miller v. California,* 413 U.S. 15 (1973), the petition for writ of certiorari was granted, the judgment was vacated, and the case was remanded to the Appellate Department of the Santa Cruz County Superior Court for further consideration in light of *Miller v. California, supra.*

Upon reconsideration, the Appellate Department of the Santa Cruz County Superior Court once again affirmed the judgment. Once again, petitioners sought a writ of certiorari before this Court. That petition was denied on the ground that the judgment which petitioners sought to have reviewed was not by the highest state court in which a decision could be had as required by 28 U.S.C. §1257. *Kuhns v. California,* 419 U.S. 1066 (1974).

Upon remand to the Appellate Department of the Santa Cruz County Superior Court, petitioners moved for Recall of the Remittitur, Relief from Default, and to Vacate the Judgment. On June 3, 1975, an order was filed in the Superior Court by which the motions were granted. By the same order the cause was certified for transfer to the California Court of Appeal, First Appellate District, pursuant to the provisions of California Penal Code section 1471, and California Rules of Court, Rules 62 and 63. A decision in the matter was rendered by Division One of that court on September 8, 1976. *People v. Kuhns,* 61 Cal.App. 3d 735, 132 Cal.Rptr. 725 (1976). By that decision all convictions as to petitioner Kuhns were affirmed.

Conviction arising from the trial which took place in May, 1971, as to petitioner Castner was also affirmed, but the convictions arising from the trial which occurred in September and October, 1971, were reversed on the ground that there was insufficient evidence to demonstrate that petitioner Castner had actually participated in the distribution of the obscene matter. A petition for hearing in the California Supreme Court was denied on November 4, 1976. The instant petition for writ of certiorari followed.

STATEMENT OF THE FACTS

1. The first trial (May, 1971)

Lieutenant Charles Scherer of the Santa Cruz Police Department testified that at approximately 12:00 p.m. on January 2, 1971, he entered Frenchy's K & T Bookstore in the City of Santa Cruz (RT 54-55). Petitioners Kuhns and Castner were behind the counter in the store. Several customers were also in the store (RT 54-55). Against one wall of the store was a display containing 30 to 40 magazines and paperback books, which were each covered with clear plastic and had pictures cut out and pasted on what would otherwise be the covers of those books or magazines. The officer selected a book and bought it to the sales counter. The picture pasted on its cover depicted, in the lieutenant's words, "the lower portion of a male body with a female leaning backwards committing an oral copulation on the other male that was standing over." ((RT 59:2-6).

The lieutenant placed the magazine on the sales counter along with a $20.00 bill. Petitioner Castner took the magazine, went to a file cabinet, opened a drawer and removed a magazine from it. This magazine did not have the same picture on its cover. The lieutenant called this to Castner's attention, and complained that it was a different book. Castner replied that it was the same book that the lieutenant had selected and that he could find the picture which was on the cover of the display copy inside the other magazine. As this was occurring, Kuhns, who had been standing alongside Castner near the cash register, received the $20.00 from Castner and changed it, returning $9.50 to the lieutenant (RT 59-60, 65-66).

The lieutenant described some of the store's adornments at the time of his purchase of the magazines as follows:

> "On the wall were various descriptive or described type male penises in colors, short and large in diameter, others long. On top of the counter, there was what is commonly known as French ticklers. Behind or in the display cabinet, there was battery-operated vibrators, again in the form of a male penis, artificial rubber-type female vaginas, water-type, artificial Spanish fly." (RT 79:10-16).

After the lieutenant left the store, he examined the magazine which he had purchased and found that the photograph in question appeared at page 7 of the magazine (RT 67). The magazine itself, entitled "Response, the Photo Magazine of Sex for Women,

Volume I, No. 1" was admitted into evidence (RT 123), and read to the jury (RT 127-128).

The People called Sergeant Henry Petroski of the Los Angeles Police Department, who qualified as an expert witness on the issue of customary limits of candor in the description of sexual matters in the State of California. He testified that the magazine in question, taken as a whole, goes substantially beyond the customary limits of candor in the description and representation of sex and nudity (RT 172).

Louis A. Noltimer, M.D., a psychiatrist testifying as an expert witness, stated that, in his opinion, the magazine, taken as a whole, appealed to prurient interest (RT 294), and was utterly without redeeming social importance (RT 296). Dr. Neal Blumenfield, another psychiatrist, testifying for the defense, concluded that, in his opinion, the magazine, taken as a whole, did not appeal to prurient interest, and possessed redeeming social importance (RT 392-393, 395, 410).

2. The second trial (September and October, 1971)

Officer Kusanovich of the Santa Cruz Police Department entered the Frenchy's K & T Bookstore on January 7, 1971, where he observed petitioners standing behind a counter with a cash register on it. The officer unsuccessfully attempted to engage petitioners in conversation, seeking admissions from them (RT 50). The officer indicated that he wanted a book involving animals and humans (RT 28).

Officer Kusanovich looked around the store and selected a book which appeared to concern animals and humans entitled "Animal Lovers". The book was completely wrapped in a clear plastic covering, and had a photograph pasted on what would otherwise have been the cover of the book. The photograph depicted a dog with its mouth in the area of a woman's sexual organs (RT 31). The officer took the book to the counter and asked petitioner Kuhns if the photograph on the front of the book was from the book, or if there were pictures like that in the book. Petitioner Kuhns replied that the photograph was taken directly from the book. The officer inquired if the book he had was going to be disfigured by having pictures torn from it. Petitioner Kuhns stated that it was to be replaced by a book identical to the display copy. Petitioner Kuhns then took the book from the officer and gave him another copy which the officer purchased for $15.00 (RT 31-33). After purchasing the book, the officer checked it and found the picture which had been pasted on the cover at page 98 of the book (RT 41).

Officer Bertuccelli of the Santa Cruz Police Department testified that on February 4, 1971, he entered the bookstore and purchased the book "Sex and the Teenager". The officer stated that when he took the book from the shelf it was covered in cellophane with a picture underneath the cellophane. He stated that the picture depicted an act of oral copulation between a man and a woman (RT 67). The officer took the book to the counter and placed it on the

counter. Petitioner Kuhns picked the book up and went to a file cabinet located behind the counter area. Kuhns returned with another copy of the book which he handed to petitioner Castner who placed it in a paper bag and taped the bag closed. The officer stated that the book which he purchased did not have the photograph on the cover (RT 68-69).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The issue of whether the magazines in question are obscene was presented to the jury under State statutes and instructions by the court which complied fully with the provisions of the United States Constitution. Further, the California Court of Appeal correctly concluded that any error which might have occurred by virtue of instructions on the production of the matter was clearly harmless. Nor is there merit to petitioners' claim that California's "projectionist exemption" is violative of the guarantee of equal protection.

ARGUMENT

I

THE CALIFORNIA COURT OF APPEAL CORRECTLY CONCLUDED THAT THE JURY WHICH CONVICTED PETITIONER WAS PROPERLY INSTRUCTED ON THE DOCTRINE OF "PANDERING".

A. Circumstances of Production and Dissemination are Relevant in Determining Whether the Questioned Material has Social Importance.

Petitioners contend that the jury instructions given in their cases, in conformity with California Penal Code section 311(a)(2), were unconstitutionally overbroad in that they subjected them to prosecution for the acts of another not on trial, and, further, that the instructions were unwarranted because there was no evidence of commercial exploitation sufficient to support them.

Petitioners argue that it was impermissible to allow the jury to consider evidence of the circumstances of production and dissemination in determining whether the books in question were obscene. They contend such evidence is constitutionally admissible only when the creator or producer of the material is on trial. This argument is based on the erroneous premise, resulting from petitioners' use of the verb "pandering" to characterizing their offense, that the circumstances of production and dissemination are elements of the substantive offense of which they have been convicted.[1] Respondent submits that circumstances of

[1]Petitioners' premise might have merit had they been convicted of violating California Penal Code section 311.5 which provides: "Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes the sale, distribution, or exhibition of matter represented to be obsence, is guilty of a misdemeanor."

production and dissemination *are* relevant on the definitional requirement of obscenity that the matter is utterly without redeeming social importance.

At the outset it should be recognized that the offense of which petitioners stand convicted has two elements: (1) the knowing sale of; (2) obscene matter. "Obscene matter" is defined by California Penal Code section 311(a) as: matter taken as a whole: (a) the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest; (b) which goes substantially beyond customary limits of candor in description or representation of such matters; and, (c) which is utterly without redeeming social importance. California Penal Code section 311(a)(2) recognizes that:

> "In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that the matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance."

After the jurors in petitioners' cases were fully instructed on the three factors essential to a finding that the questioned material is obscene, they were further instructed:

> "In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of production, presentation, sale,

dissemination, distribution, or publicity and, particularly, whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, to which such evidence is entitled is a matter for the jury to determine.

> "Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is on the sexually provocative aspects of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance.
>
> "If the object of the work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, this may be considered evidence that the work is obscene."

Finding an opinion of Judge Learned Hand [*United States v. Rebhuhn,* 109 F.2d 512 (2nd Cir. 140)] persuasive authority, this Court concluded in *Ginzberg v. United States,* 383 U.S. 463 at 470-471 (1966), that evidence of the circumstances of presentation and dissemination of questioned material are relevant to determine whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was

the basis upon which it was traded in the marketplace or a spurious claim adopted only for the purpose of litigation. This Court concluded that where the purveyor's sole emphasis is on the sexually provocative aspects of his publication, that fact may be decisive in the determination of obscenity. The fact that the materials originate or are used as a subject of pandering is relevant to the application of the test of obscenity detailed in *Roth v. United States,* 354 U.S. 476 (1957), which is the basis of California Penal Code section 311. The fundamental notion that evidence of production and dissemination may serve to tip the balance toward a finding of obscenity first appeared in the separate opinions of Chief Justice Warren in *Roth v. United States,* 354 U.S. at 495 (concurring opinion), and *Jacobellis v. Ohio,* 378 U.S. 184, 201 (1964) (dissent). It took firmer root in the opinion of Mr. Justice Brennan (joined by the Chief Justice and Mr. Justice Fortas), delivering this Court's judgment in *Memoirs v. Massachusetts,* 383 U.S. 413, 420 (1966), before reaching full bloom in the majority opinion in *Ginzberg, supra.* The probative value of such evidence has been widely recognized by federal courts. *Cf. United States v. Palladino,* 475 F.2d 65, 70-71 (1st Cir. 1973); *Milky Way Productions, Inc. v. Leary,* 305 F.Supp. 288, 294 (S.D.N.Y. 1969) (three judge court) affirmed, 397 U.S. 98 (1970). Finally, and significantly, this Court recently rejected a challenge to these instructions which was based on an objection substantially the same as that raised by petitioners here.

"Finally, we similarly think petitioners' challenge to the pandering instruction given by the District Court is without merit. The District Court instructed the jurors that they must apply the three-part test of the plurality opinion in *Memoirs v. Massachusetts,* 383 U.S. at 418, and then indicated that the jury could, in applying that test, if it found the case to be close, also consider whether the materials had been pandered, by looking to their '[m]anner of distribution, circumstances of production, sale, . . . advertising . . . [and] editorial intent. . . .' App. 245. This instruction was given with respect to both the Illustrated Report and the brochure which advertised it, both of which were at issue in the trial.

"Petitioners contend that the instruction was improper on the facts adduced below and that it caused them to be 'convicted' of pandering. Pandering was not charged in the indictment of the petitioners, but it is not, of course, an element of the offense of mailing obscene matter under 18 U.S.C. § 1461. The District Court's instruction was clearly consistent with our decision in Ginzberg v. United States, 383 U.S. 463 (1961), which held that evidence of pandering could be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition of obscenity is applied." *Hamling v. United States,* 418 U.S. 87, 130 (1974) (Emphasis added).

It must be recognized that here, as in *Hamling,* the jury was fully instructed that in order to convict they had to find, *beyond a reasonable doubt,* each of three factors which constitutionally define obscenity.

The questioned instructions were clearly consistent with the holding of *Ginzberg,* and merely indicated the probative value evidence of production and dissemination may have in determining social value.

California courts have held that California Penal Code section 311(a)(2) does not create a new substantive offense. *People v. Noroff,* 67 Cal.2d 791, 63 Cal. Rptr. 575 (1967). Since such evidence is instead relevant to the determination of the obscenity of the books themselves, there can be little doubt as to the applicability of the instructions in the instant case. Here there was the added element of evidence that petitioners attempted to "force public confrontation with the potentiality offensive aspects of the work." *Ginzberg, supra,* at 470. It is to be recalled that the display copies of the particular books accentuated the salacious aspects of the books by displaying pictures from inside on what would otherwise have been the covers of these volumes. Similarly, the display in close proximity to the magazine rack of assorted items such as imitation sexual organs is a circumstance relevant in determining the issue of obscenity. Thus, respondent submits there was ample evidence of commercial exploitation to justify the giving of the challenged instructions.

II

THE CALIFORNIA COURT OF APPEAL CORRECTLY CONCLUDED THAT ANY ERROR WHICH OCCURRED FROM INSTRUCTIONS REGARDING "CIRCUMSTANCES OF PRODUCTION" WAS CLEARLY HARMLESS.

Petitioners next contend that this Court should grant certiorari to set forth the proper standard to be applied when error occurs in the prosecution of an obscenity case. They base this contention on the finding by the California Court of Appeal that instructions which make reference to the circumstances of "production" may be considered erroneous in an action for exhibiting and distributing a finished product, unless there is evidence to connect the exhibitor and distributor with the producer. Having found such error, the court nonetheless concluded that there was no possibility that the jury could have been misled by such instructions. Petitioner speculates that the test applied to measure the weight of the error *might* have been the "state test" set forth in *People v. Watson,* 46 Cal.2d 818, 299 P.2d 243 (1956), as opposed to the more stringent test set forth in *Chapman v. California,* 386 U.S. 18 (1967).

We submit that the law is clear that the *Chapman* standard must be applied where the error is of Federal "constitutional dimension". Thus, depending upon the nature of the error in an obscenity prosecution, the standard to be applied measuring the weight of the error in a given instance might vary with the situation. However, it is also clear that the California Court of Appeal's conclusion was correct under either standard in this case. The logic of such a finding is

compelling. If, as found by the court, there was no evidence of the circumstances of production, then clearly the jury could not have looked to such circumstances on those instructions to petitioners' detriment. Petitioners, somewhat ambiguously, argue that the matter itself constituted evidence of the circumstances of production. If this is true, then we submit that there was evidence sufficient to justify the giving of the instruction, and, contrary to the finding of the California Court of Appeal, no error occurred at all. Under either circumstance, it is clear that any conceivable error which occurred by the giving of these instructions was "harmless beyond a reasonable doubt", thus satisfying the *Chapman* standard. Accordingly there is no merit to petitioners' contention that the instructions created ambiguity and confusion in the minds of the jury.

III

PETITIONERS WERE NOT DENIED THE EQUAL PROTECTION OF THE LAW BY REASON OF THE "PROJECTIONIST EXEMPTION" TO THE CALIFORNIA OBSCENITY STATUTES.

Petitioners argue that the "projectionist exemption" in Penal Code section 311.2(b), which provides that the basic proscription against the possession or printing of obscene matter with intent to sell or distribute is inapplicable to a "motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place

wherein he is so employed", violates the equal protection clause. It is alleged that the statute in some manner affects petitioners' exercise of their First Amendment rights. We are unaware, however, of any First Amendment right to possess obscene matter for purposes of sale or distribution.

California courts have strictly construed the term "projectionist". In *People v. Stout,* 18 Cal.App.3d 172, 95 Cal.Rptr. 593 (1971), the court held that a defendant who operated a projector was not exempt since he was the only person on the premises, took admissions money and generally supervised the operation on behalf of the owner. Petitioners have not demonstrated or alleged that they have occupied a similar status to that of a mere projectionist at Frenchy's K & T Bookstore.

The legislative judgment of the states in determining to attack some, rather than all, of the manifestations of an evil aimed at is normally given the widest discretion and benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964). The classifications herein are not inherently suspect, nor are they arbitrary. There are, of course, basic differences in the functions performed by the projectionists and bookstore clerks. Similarly, opportunities for examination of the character of the material vary between the two medias. For these reasons, we submit that the California Court of Appeal properly rejected petitioners' contention on this issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of ceriorari should be denied.

Dated, April 6, 1977

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